No. 15173.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GABRIEL T. MARTINEZ and THERESA MARTHA MARTINEZ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, which adjudged appellants to be guilty of certain counts of an indictment (see Statement of Case, below), which indictment was brought under the provisions of Section 371 of Title 18 and Section 174 of Title 21, United States Code [R. 43-52].

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [R. 3-6].

The jurisdiction of the District Court is based upon Section 3231, of Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the

proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

An indictment in five counts was filed on March 21, 1956 [R. 6], essentially charging the appellants and others in the first four counts as follows:

Count I, from August 1, 1955 until the return of the indictment both appellants, Cesario Gavaldon, Joel Hernandez and Luis Campos conspired together to receive, conceal, transport and sell narcotics.

Count II, on February 27, 1956, appellant Gabriel T. Martinez and said Gavaldon and Hernandez received, concealed and transported 204 grains of heroin.

Count III, on February 27, 1956, appellant Gabriel T. Martinez and said Gavaldon and Hernandez sold 204 grains of heroin to Jack C. Howe.

Count IV, on February 27, 1956, both appellants received and concealed 32 grains of heroin [R. 3-6].

The fifth count of the indictment was dismissed on motion of the Government [R. 29, 34].

All defendants below initially pleaded not guilty [R. 8-9]; Hernandez later changing his plea to guilty under Counts Two and Three [R. 30].

After plea but prior to trial appellants moved for the return of certain property and its suppression as evidence [R. 9-12], which motion was opposed by the Government [R. 13-28] and after a hearing thereon said motion was denied by the trial court [R. 29, 33].

Trial commenced May 22, 1956 [R. 30, 57] and resulted in a verdict of guilty against all of the defendants, including appellants, as to each of the counts in which they were charged [R. 41-43]. Appellants had moved for judgment of acquittal at the close of the Government's case in chief and at the close of all the evidence [R. 37, 40]; they also renewed their motion to suppress evidence [R. 40].

Judgment was entered on June 11, 1956 [R. 43-52]. Notice of appeal was filed June 19, 1956 [R. 53-56].

III.
STATEMENT OF FACTS.

Jack Charles Howe, who is a sporadic user of heroin, frequently purchased such narcotics in the vicinity of Temple and Alvarado Streets, Los Angeles, during the months of October through December of 1955 [R. 95-96]. It was here that he first met the defendant Hernandez [R. 70-71, 94] and was able to make a purchase of heroin from him [R. 97]. Howe also had appellant Gabriel T. Martinez pointed out to him at this location and thereafter saw Martinez several times in this vicinity [R. 70, 93-94]. Gabriel was known to Howe and others as "Velli" [R. 77].

In November 1955, appellants Gabriel T. Martinez and Theresa Martha Martinez had jointly purchased a house at 3040 Atwater Street, Los Angeles, paying $6,000.00 cash as the down payment [R. 59-62] and each making payments on the note for the balance [R. 62]. Apparently possession of these premises was given to the appellants Martinez in December, 1955 or January 1956 [R. 60]. Appellants were known to be co-occupants of the premises thereafter.

In January 1956, Howe's method and place of securing narcotics shifted to the immediate vicinity of the 3040 Atwater Street premises [R. 97]. On five separate occasions commencing in January 1956, at intervals between four or five days and a week and ending on February 27, 1956, Howe made purchases of heroin in this area [First Transaction: R. 72-79, 108-115; Second: R. 80-83, 118-122; Third: R. 83-86; Fourth: R. 87-88, 126-127; Fifth: R. 89-92].

In each instance, Howe first contacted defendant Hernandez at Hernandez's home on Boylston Street [R. 98], then, sometimes in company with others, Howe and Hernandez would drive to a point near an ice cream stand near the Atwater home of the appellants and park [R. 75-76, 80, 84, 87]. In each instance defendant Hernandez made a telephone call from a booth nearby [R. 76, 80, 84, 87, 90], and minutes later a person would leave the house at 3040 Atwater Street and join Howe and Hernandez, delivering a quantity of heroin [R. 78-79, 82-83, 86].

On the first, third and fourth such occasions, it was appellant Gabriel T. Martinez who came out of the 3040 Atwater Street premises to deliver the heroin [R. 76-77, 84-85, 88]. On the second and fifth such occasions it was the defendant Gavaldon who left said premises to make the delivery [R. 81, 90-91].

On the fourth such occasion of Howe's purchasing heroin, appellant Gabriel T. Martinez, who left the house and delivered the narcotics, was accompanied part way by the defendant Campos. Campos and Gabriel left the house together and Campos was seen to look up and down the street several times [Tr. 87, 126-127]. It was on this occasion that appellant Gabriel stated to Hernandez that

he could supply as much "junk" as wanted and at any time [R. 88]. There had been other conversations between Howe and Hernandez wherein Hernandez stated he could get any amounts of heroin Howe wanted at "Velli's" [R. 91].

Prior to the fifth such transaction, Howe testified he had made a full disclosure of all the details of the foregoing to Agents Jones and Gullon of the Bureau of Narcotics [R. 89]. Howe then entered into the fifth transaction while being observed by Jones and Gullon [R. 89-91].

Agents Jones and Gullon of the Los Angeles Office of the Bureau of Narcotics after being informed of the details of Howe's activities in purchasing heroin from Hernandez, Gavaldon and Gabriel T. Martinez [R. 129] as set forth above, requested Howe to make another purchase [R. 129]. On February 27, 1956, Howe was supplied with $140 for such purchase and the serial numbers of the bills were recorded [R. 129]; thereafter, Howe met Hernandez at the latter's home [R. 130, 172] and they proceeded to the ice cream stand at Fletcher and Atwater, arriving there at approximately 2 P. M., after Jones and Gullon had located themselves in that area [R. 130-134].

Hernandez bought some ice cream, made a phone call from a nearby booth [R. 174] and then proceeded down Atwater [R. 134]. Gavaldon left the premises at 3040 Atwater, crossed the street and met him [R. 135, 175]. Currency was exchanged; (on a subsequent search Hernandez was found with $20.00 and Gavaldon with $120.00 of the original $140.00 given to Howe by the officers [R. 167, 185]). As Agent Gullon approached, Gavaldon threw down a package which was retrieved by Jones [R. 136, 175].

Gavaldon and Hernandez were arrested [R. 136, 175] and at that point spoke to each other in Spanish [R. 136-137], a language understood by Agent Gullon [R. 177]. Their conversation was in essence as follows: Hernandez asked what happened to the package; Gavaldon said he threw it away; Hernandez asked if anything happened, would Velli take care of it; Gavaldon stated there was nothing to worry about, that Velli was waiting for the money *at the house,* and if he didn't show up at any time, that Velli knew what to do and would take care of everything [R. 177-178]. (Emphasis added.)

A field test was made immediately on the contents of the package which Gavaldon had thrown down and it was found by the officers to be a derivative of opium [R. 150-151, 176]. The situation as it was then known to the officers was discussed and they determined to make an immediate arrest of appellant Gabriel T. Martinez whom they believed to be in the premises at 3040 Atwater Street [R. 154, 178].

Jones went to the front door and Gullon to the back door, each identified himself as a federal narcotics agent and demanded admittance [R. 138, 179]. At the same time both officers heard noises of moving furniture, shuffling and running feet, coming from inside the house [R. 139, 180]. Jones immediately began to break in and was the first to enter [R. 199]. Gullon, while in the course of identifying himself and demanding admittance, observed the appellant Theresa Martha Martinez locking the door which was between them. He immediately forced an entrance, kicking in the door [R. 179-180, 198].

Jones, after entering, found himself in the living room, with bedrooms to his left, and the kitchen toward the rear of the house [R. 140]. As he moved toward the second

bedroom, Campos, whom he recognized from a description furnished by Howe, ran out of the bedroom "full tilt" into him [R. 140-141]. Campos then turned and ran back into this bedroom. Jones shouted that he was a federal narcotic agent, that Campos was under arrest, and followed into the bedroom [R. 141]. A second man was climbing out of the bedroom window and Campos started to follow. Jones fired a warning shot low and to the left of the window, while ordering the men to halt, and then he grabbed Campos by the legs in an effort to hold on to him, but Campos kicked free and went on outside [R. 141-142]. When Jones looked out the window he was fired on by the other man, one of the shots striking Jones in the hand [R. 143]. Jones fired another shot over the head of Campos, as he fled towards the street between the adjacent houses, and Jones continued to call upon Campos to halt. A third shot hit Campos in the buttocks as he reached the front of the house and he fell on the front lawn [R. 143]. Jones left the house by the window and gave chase after the other man, but was unable to catch him [R. 144].

In the meantime, Gullon, who had entered by the rear door, made a quick search of the premises for appellant Gabriel T. Martinez, but found no one in the house except appellant Theresa Martha Martinez [R. 180, 199, 290]. He then went to the front yard, placed Campos under arrest, returned to the house and telephoned for an ambulance and for additional officers [R. 180-181].

Uniformed officers of the local police arrived first, and an ambulance and four other Federal Agents arrived about the time Agent Jones returned from his chase [R. 144, 147, 157-159, 200-201]. These agents and some plainclothes officers came into the house, but no search was

commenced until Agent Gullon asked appellant Theresa Martha Martinez for permission to look for narcotics [R. 157, 164, 188]. Permission to commence the search was given by her upon first being requested, which occurrence was about thirty minutes after the breaking in by the officers [R. 145-146, 148-149, 156, 181-183]. Additional permission was requested and received as the officers moved from room to room [R. 147-148]. The requests and replies were made in both English and Spanish [R. 183]. Appellant Theresa Martha Martinez's attitude was described as cooperative [R. 183], and she replied on one occasion that she had no objection because any narcotics found would belong to Velli [R. 145]. No force was used in the course of the search [R. 147-148].

Prior to the search of the kitchen, appellant Theresa Martinez was asked by Gullon about her use of the kitchen. She replied that she used the stove and all of the utensils and, in effect, stated that she did the cooking [R. 184]. In another conversation during the search appellant Theresa Martha Martinez stated that on one occasion she had seen Velli, Gavaldon and Campos fooling with a powdery substance on the kitchen table [R. 149]. At another time when shown a package of capsules which had been found in an oatmeal box, appellant Theresa Martinez replied that it belonged to Velli and she stated she had warned Velli to "get rid of these friends of his, they were all going to get into trouble." [R. 148-149.]

There were boxes of empty gelatin capsules, similar to the filled ones found in the package thrown down by

Gavaldon, open to view in the kitchen and on one occasion appellant Theresa attempted to hide such a box and knocked it to the floor, spilling the contents [R. 149, 195-196].

A package of capsules filled with heroin was found in an Albers Oatmeal box which was in the kitchen cupboard [R. 209, 186-187]. Two tins of powdered milk sugar were found in the same cupboard [R. 210]. A large quantity of balloons and finger stalls were found in a utensil drawer in the kitchen [R. 211]. Three boxes of gelatin capsules were found in a waste basket on the back screened porch [R. 210-211]. Balloons with their tops cut off were found in the back yard [R. 213], and a small paper "bindle" of loose heroin was found in the garage [R. 214].

Each of the packages of capsules full of heroin was made up of capsules wrapped tightly in a ballon with its top cut off short just above the contents, or in a finger stall similarly [R. 111, 113, 150, 152-153]. In some, the smaller packages were contained in a larger package, also made from a balloon or finger stall [R. 150].

Chemical analysis showed that the package recovered in the street [Ex. 3, R. 168]; the package found in the kitchen [Ex. 4, R. 185-186]; and the bindle from the garage [Ex. 11, R. 214]; all contained heroin, a derivative of opium [R. 219-220]. It also showed that Exhibits 3 and 4 were from a common source, by reason of their containing the same amounts of chlorides, traces of novocain, quantities of milk sugar, and being the same color

[R. 221]. The milk sugar contained in the tins found in the kitchen was of the same kind as the lactose or milk sugar mixed with the heroin [R. 221-222].

The weight of the three separate quantities of heroin (described above) was as follows: Exhibit 3, 174 grains after analysis, plus 12 to 15 grains used in analysis; Exhibit 4, 29 grains, plus 6 grains used; Exhibit 11, 3 grains, plus 1 or 2 grains used [R. 222-223].

Appellants Gabriel and Theresa Martinez were known to drive a 1956 Lincoln Premier and a 1956 Oldsmobile 98 [R. 159, 189], the first being owned by Theresa [R. 286], and the second being in the name of Gabriel [R. 164, 190, 284]. Appellant Gabriel admitted at one time owning and paying "almost $6,000.00" for the Lincoln [R. 162, 189]. He also stated to the officers that he had several bank accounts, in one of which the deposit was $6,000.00 [R. 163, 190], that he wasn't working at this time but when he worked it was as a student barber. He stated he had won money gambling in the army [R. 163].

Appellant Gabriel's testimony on this point was to the effect that he hadn't worked since 1950 [R. 287], that he had saved his money from army service as a private first class and from money earned standing combat watches for his buddies [R. 288-289]. He was discharged from the Army in 1952 [R. 287].

Appellant Theresa Martha Martinez was shown to be the proprietor of a restaurant with a capacity of twelve customers [R. 275].

Additional facts will be discussed as they become pertinent to the argument.

IV.
ARGUMENT.

A. Sufficiency of the Evidence (Including Inferences of Guilt Outweighing Presumption of Innocence.)

Appellants' Specifications of Errors—Points I and III.

Two preliminary matters should be discussed. Appellants argue that the evidence is insufficient to sustain the convictions on all counts in which they are charged and convicted. Much of their argument is based upon the proposition that each of the transactions involved were "isolated transactions under the conspiracy charge", and not evidence under Counts II, III and IV of the indictment, stating that counsel for the government had so limited his proof in his offer to the court [see p. 12 of App. Br., citing Tr. p. 73]. The offer was *not* so restricted. "We represent this is part of the conspiracy *and part of the acts,* and we will tie it in later" [R. 73].

The government's theory was and is that within each of the substantive counts of transportation and sale (Counts II and III), there was a concert of action between Hernandez, Gavaldon and appellant Gabriel T. Martinez. It was and is the government's position that all prior transactions have probative value as to these counts (and also to Count IV, to be discussed later), as well as to the conspiracy count (Count I).

Appellants in their brief also attempt to confuse the proof in respect to the amounts of heroin involved in each of the substantive counts (see pp. 12 and 15). The proof, however, is clear that Exhibit 3 was the heroin being delivered and sold and which was thrown down in the street by Gavaldon on February 27, 1956 [R. 168-169]; that Exhibit 4 was concealed in the oatmeal box

in the kitchen of the Martinez' house [R. 185-186, 208-209]; and that Exhibit 11 was concealed in the garage [R. 214].

It is true that it is pleaded in Count II that 204 grains were received, concealed and transported and that the proof is that Exhibit 3, which is applicable to this count, contained 174 grains after examination, but originally contained 186 to 189 grains [R. 222-223]. It is submitted that the variance here between 204 grains and 186 to 189 grains, is immaterial.

United States v. Wodiska, 147 F. 2d 38 (2d Cir., 1945);

Stevens v. United States, 206 F. 2d 64 (6th Cir., 1953).

Count III, which charges the sale of the same heroin, also refers to 204 grains. Again, Exhibit 3 is the heroin offered in proof of this count and again the proof is that 186 to 189 grains are involved instead of 204 grains as pleaded [R. 222-223].

In respect to Count IV, the concealment by both appellants of 32 grains of heroin, as pleaded, the government offered as proof the quantity found in the kitchen of their jointly owned home, which was Exhibit 4 and which weighed 29 grains after examination and 35 grains before examination [R. 222-223]. Again, we submit the variance between the 32 grains pleaded and the 35 grains proved is immaterial.

Exhibit 11, the "bindle" of 3 grains, after examination plus 229 grains used and found in the garage, was offered as proof of a similar act of concealment. It could have been the basis of a separate charge, but was not.

Neither the before-examination weight nor the after-examination weight of these exhibits totals 204 grains as asserted by appellants (pp. 12 and 15 of brief). Total weight of all three exhibits before examination was 225 to 229 grains; after examination 206 grains.

To review all the evidence in the record relative to these charges is beyond the scope of a brief. Further, this court is not confined to the bare statements of the witnesses but should consider the evidence and *all the inferences* which may reasonably be drawn therefrom in the aspect most favorable to supporting the verdict or findings of the court below.

Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853;

Penosi v. United States, 206 F. 2d 529, 530 (9th Cir., 1953);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

A reasonable inference from the facts testified to is that appellant Gabriel T. Martinez was engaged in a series of transactions with Hernandez and Gavaldon for the transportation and sale of narcotics—that the conduct of all three was joint and, as a result of a tacit agreement or understanding.

It is not necessary that proof be adduced to show an express agreement to violate the law. Circumstantial evidence to the effect that defendants are acting in concert as the result of an informal understanding for a common purpose is sufficient.

Coates v. United States, 59 F. 2d 173 (9th Cir., 1932);

Reavis v. United States, 106 F. 2d 982, at 984-985 (10th Cir., 1939);

Telman v. United States, 67 F. 2d 716 (10th Cir., 1933);

Martin v. United States, 100 F. 2d 490 (10th Cir., 1938);

Marino v. United States, 91 F. 2d 691, at 694 (9th Cir., 1937).

Here we have three men engaged in transporting and selling narcotics under a procedure which conforms to an exact pattern which was repeated five times. The only differences between the various sales are that the delivery was made on some occasions by Gavaldon and on others by Gabriel Martinez and at one time Campos accompanied Gabriel, inferentially acting as lookout.

Each time, just before the delivery, Hernandez made a telephone call, and moments later the delivery was made by either Gavaldon or Gabriel Martinez leaving the home at 3040 Atwater Street. A reasonable inference is that the call was made to that place, the narcotics were gathered from their hiding place, and the delivery was commenced.

Cognizant permission by Gabriel Martinez to the use of his home as the base of distribution would in itself be aiding and abetting the transportation and sale of

narcotics by Gavaldon and would subject Gabriel to punishment as a principal to such transportation and sale.

Sec. 2, Title 18, U. S. C.

Such knowledge and such permission on the part of Gabriel T. Martinez could reasonably be inferred from the frequency of the transactions, his own deliveries of narcotics, his own statement to Hernandez in the presence of Howe that he could supply as much "junk" as wanted and at any time [R. 88], and that the deliveries were made in each instance from his home.

The jury could have drawn the further inference that Gabriel Martinez was financially interested in these transactions from his statements made to the officers about the amounts of his bank accounts, his ownership of the two cars, and the size of the cash down payment on the home, each taken together with his statements to the officers and his testimony to the effect that he had not worked since 1950 [R. 287] and had left the army in 1952 [R. 287]. The jury was fully justified in disbelieving the explanation offered on the source of his money.

Elwert v. United States, 231 F. 2d 928, at 933-934 (9th Cir., 1956).

The use of the home as a base of operations is further substantiated by the fact that Howe purchased his narcotics in the latter part of 1955 on Temple Street [R. 95-96], buying narcotics on one occasion from Hernandez [R. 97], but shifted with Hernandez to purchases of narcotics which were delivered from the Martinez home in January 1956. This is about the time the Martinezes took possession of that property.

After showing these men to have been acting together, the jury could properly consider Hernandez's remark that he could get any amounts of heroin Howe wanted at Velli's [R. 91] against all three.

Bartlett v. United States, 166 F. 2d 920 at 925 (10th Cir., 1948).

As we understand it, appellant Gabriel T. Martinez argues two propositions as to the insufficiency of the evidence against him on Counts I, II and III:

First, that the prior transactions are "isolated transactions" and by this we assume he means they were not the result of concerted action to which he was a party; second, that he was not present on February 27, 1956, when the transportation and sale set forth in Counts II and III were consummated.

Whether or not these five transactions are "isolated" from one another and independently undertaken by the persons shown to be engaged therein is a question of fact, now decided by the jury's verdict.

This question must necessarily be submitted to the jury where the transactions are tied together by time, there was an over-all elapse of time on these five sales from early in January to February 27, 1956; by location, all took place in the same immediate area of less than a block from the Martinez home; and by similarity of procedure; and by similarity of object.

It is not necessary that a person be present at the commission of a crime to be a participant therein or to be punished as a principal thereof.

United Cigar v. United States, 113 F. 2d 340, 346 (9th Cir., 1940), and cases there cited.

Nor is it necessary that participation by aiding, abettor or counselling the commission of a crime be shown by direct evidence. Circumstantial evidence is sufficient.

Marino v. United States, 91 F. 2d 691 at 698 (9th Cir., 1937).

Notwithstanding the foregoing, the jury could properly have concluded that Gabriel T. Martinez was present at 3040 Atwater Street on February 27, 1956, and that he escaped through the bedroom window upon the officers' entrance. The evidence shows that after identifying themselves and demanding admittance the officers heard a great deal of commotion inside the house [R. 139, 180]; that it was about ten seconds thereafter before Jones was able to get inside the house [R. 139]. Yet even after this lapse of time Campos came running out of the bedroom and collided with Jones in the living room. We suggest that the jamup to get out of the bedroom window was so great that Campos was seeking another way out. Even after all this, when Jones entered this bedroom he saw a man then in the act of leaving by the window [R. 142]. Surely there had been time for more than one to leave, and isn't it reasonable to deduce that there was another who preceded the man Jones saw?

In this connection, notwithstanding the bland statement of Appellants' Brief at page 14 to the contrary and the cases which are there cited which are not in point, we believe the jury was entitled to consider the conversation between Gavaldon and Hernandez which occurred in Spanish to the effect that Velli was waiting at the house for the money.

First of all, there was no objection made to this conversation being testified to by any of the defendants be-

low [R. 177-178] and there was no motion to strike. It was incumbent upon appellants to request the trial court to limit the conversation to the participants.

> "It is urged that the testimony of the secret service agent that Reavis and Smith stated to him in the presence of Carroll that the three of them came to town together and that Carroll did not deny the statement was inadmissible and prejudicial to Carroll. The argument is that a person under arrest on a criminal charge is not called upon to deny or contradict statements of others made in his presence tending to connect him with the offense, and that such statements though not denied or contradicted by him are not admissible against him. The contention is met with two obstacles. First, no objection was interposed to the testimony at the time of its admission. The statement is made in the brief of appellants that the testimony was admitted over objection but the record fails to support the statement. The record is barren of any objection whatever. Ordinarily a defendant in a criminal case cannot remain silent when evidence is offered against him and thereafter be heard to complain in respect of its admissibility. Such a quiescent attitude constitutes a waiver of the question. Furthermore, the testimony was clearly admissible as against Reavis and Smith, and it was the duty of Carroll to request that it be limited to them if he so desired. No such request having been made in any form, he cannot be heard to complain on appeal that the testimony was inadmissible and prejudicial as to him."
>
> *Reavis v. United States,* 106 F. 2d 982 at 985 (10th Cir., 1939).

Second, this was a statement made to further the objects of the conspiracy and to advise a conspirator of the

disposition and further *concealment* of narcotics. We quote the testimony: (Testimony of Michael Gullon.)

"* * *

"He then asked the defendant Gavaldon in Spanish, 'What happened to the package?'

"The defendant Gavaldon stated in Spanish, 'I threw it away.'

"The defendant Hernandez then asked the defendant Gavaldon if anything happened that Velli would take care of it.

"The defendant Gavaldon stated that there was nothing to worry about, that Velli—that is, the defendant Gabriel Martinez, as they called him—that Velli was waiting for the money at the house, and if he didn't show up at any time that Velli knew what to do and would take care of everything."

Although the general rule is that the conspiracy ends as to an arrested conspirator, there are exceptions as to whether what is said or done thereafter by him is admissible against the other conspirators.

In *Ferris v. United States,* 40 F. 2d 837 (9th Cir. 1930), this court recognized such an exception as to certain actions of arrested conspirators which tended to implicate other conspirators not then present. The court said:

"However, in the case at bar we are of the opinion the conspiracy was not terminated even as to Sanchez and Wilson upon their arrest. The object of the conspiracy was the successful transportation of contraband liquor. The means adopted to carry that object into execution was the actual transportation by defendants Sanchez and Wilson driving and accompanying the loaded auto-truck under convoy of appel-

> lants equipped with a machine gun and colt revolver. Until the convoy was *hors de combat* by the arrest of appellants the conspiracy was not terminated as to any of its participants."

In the above case the court was concerned with the credibility of the *conduct* of Sanchez and Wilson after arrest being greater than the credibility of declarations and so permitted it to be described. Here the authenticity and credibility is evidenced by the factor that Hernandez and Gavaldon were speaking a language they obviously thought was not understood by the officers.

It is clearly shown that the statement was made immediately upon arrest [R. 136-137].

See also:

Fisher v. United States, 8 F. 2d 978 (1st Cir., 1925);

Zamloch v. United States, 193 F. 2d 889 (9th Cir., 1952).

On all the foregoing it is submitted the question of appellant Gabriel T. Martinez's guilt was properly one for the jury under Counts I, II and III.

Although the evidence has been discussed above only as it relates to Gabriel T. Martinez and Counts I, II and III of the indictment, this was done for convenience, and we do not intend to create the impression that the further discussion of the evidence as to Count IV and the appellant Theresa Martha Martinez should be considered separately.

Once a conspiracy is shown to exist, participation therein can be shown by admissions.

Bartlett v. United States, 166 F. 2d 920 at 925 (10th Cir., 1948).

We understand this rule to apply to *participation in the agreement* to violate the law, because it is not necessary that each conspirator perform an act to further the objects of the conspiracy. It is sufficient if one overt act be performed by one of the conspirators. The others may have done nothing but enter into the agreement.

Marino v. United States, 91 F. 2d 691 at 694 (9th Cir., 1937).

Whether a person has entered into the agreement to violate the law or is merely associating with conspirators is a question of fact. And the proof may be direct or circumstantial—oral admissions being properly considered.

Marino, supra, at 694.

And either of two theories, supported by proof, are permissible to show liability to punishment as a principal. Theresa may be shown to be a party to the agreement or it is sufficient to show that she knowingly aided or abetted a conspirator in performance of an overt act.

Marino, supra, at 696.

As this court has stated:

> "The knowledge of some of the conspirators as to the scope thereof may be limited. Knowledge of membership or division of spoils is immaterial. Nor need overt acts be in themselves substantive offenses. A person knowing of a conspiracy to violate the law, and knowingly assisting in any way in furthering such unlawful enterprise, is guilty. . . ."
>
> *Coates v. United States,* 59 F. 2d 173 at 174 (9th Cir., 1932).

The conspiracy as to Theresa Martinez and Count IV as to both appellants will be discussed together.

Theresa and Gabriel T. Martinez were joint owners and co-occupants of the premises at 3040 Atwater Street. Theresa stated to the officers that she used the stove, did the cooking and used all of the kitchen utensils. Exhibit 4, a package of heroin capsules, was found in the kitchen in a box of oatmeal. Theresa had further stated she had seen Velli, Gavaldon and Campos fooling with a powdery substance on the kitchen table, she stated the package of heroin capsules found in the kitchen belonged to Velli, and she stated she had told Velli to get rid of these friends of his or they were all going to get into trouble. There were boxes of empty gelatin capsules open to view in the house and at one time Theresa tried to hide one. Balloons and fingerstalls were found in the kitchen, also tins of powdered milk sugar. Inferentially, Theresa was benefited financially by the traffic in narcotics. Although she was shown to have been a proprietor of a restaurant, it was small, with a capacity of only 12 customers, and this would hardly account for the affluence of the Martinez's in their ownership of the house, the two 1956 automobiles and the bank accounts.

There should be considered here the activity of the other defendants, prior to February 27, 1956, and on that day, which occurred at these premises. Inferentially, much of it would come to Theresa's attention.

Certain of Theresa's statements to the officers were both incriminatory and exculpatory. The jury would nonetheless be entitled to believe part and disbelieve the balance.

> "Elwert argues that the jury could not believe that part of Hammond's testimony which helped the Government's case and fail to credit that part favorable to him. We do not agree. The jury may conclude

a witness is not telling the truth as to one point, is mistaken as to another, but is truthful and accurate as to a third."

Elwert v. United States, 231 F. 2d 928 at 933-934 (9th Cir., 1956) and cases there cited.

The evidence is reasonably susceptible to the finding that Theresa had full knowledge of the use of her home as a center of traffic in narcotics. At the very least she must have known of its concealment on the premises which was one of the purposes of this conspiracy.

In a case very similar to this, as to the appellant Theresa, this court said:

"The court also instructed the jury that if appellant Gullo 'gave the use of his premises for the landing or the storage of the alcohol, he assisted in the enterprise,' and that it seemed to the court that it would not be a violent inference to infer that appellant Gullo had knowledge of the conspiracy. We believe the inference is correct. It is highly improbable that Gullo could permit such use of his premises, without knowing that the men who stored the alcohol had agreed to defraud the United States. Of course the court instructed the jury that his comment on the evidence was 'in no sense controlling upon' the jury."

* * * * * * * *

"As to Gullo, the evidence is meager, though we believe sufficient. It is true that: 'The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto.' Weniger v. United States (C. C. A. 9), 47 F. (2d) 692, 693. But here, Gullo permitted

his premises to be used for storage and the re-canning of alcohol. Such permission aided the purpose of the conspiracy, and as we have said, the jury could properly infer knowledge.

"We find no error affecting the substantial rights of appellants."

Marino v. United States, 91 F. 2d 691 at 699; Cert. denied as to Gullo in *Gullo v. United States,* 302 U. S. 764.

As to appellant Theresa Martinez, there have been cited a number of cases purporting to show that the foregoing evidence is insufficient to justify a conviction on the conspiracy count. We have no quarrel with the general statements of law quoted from these cases, but close analysis shows they are not analogous to this case on the facts or they found there was sufficient evidence for a conviction.

In *Dennert v. United States,* 147 F. 2d 286 (6th Cir., 1945), cited on page 17 of brief, the court's decision was based upon the lack of showing of knowledge on part of appellant and that the liquor was found on vacant portion of the premises.

In *Eng Jung v. United States,* 46 F. 2d 66 (3rd Cir., 1930), cited Ang (*sic*) Jung at page 17 of brief, the narcotics were found in the apartments of others, not even in constructive possession of the appellant.

In *United States v. Stoppenbeck,* 61 F. 2d 955 (2d Cir., 1932), no knowledge or possession was shown.

In *De Bonaventura v. United States,* 15 F. 2d 494 (4th Cir., 1926), the evidence was held sufficient and reversed because of instructions.

In *Chin Wah v. United States,* 13 F. 2d 530 (2nd Cir., 1926), cited on page 20 of brief, those defendants who had possession or knowledge were convicted of the conspiracy count as well as the substantive count.

The quoted portion from the case of *Butler v. United States,* 197 F. 2d 561 (10th C. C. A., 1952), which appears in the brief at pages 20 and 21, was from an instruction which had been refused although the court there states it is a correct general statement of law, though slanted slightly.

In *Bartkus v. United States,* 21 F. 2d 425 (7th Cir., 1927), the facts are entirely dissimilar. The material there dealt with was not contraband in any sense of the word and no knowledge that it was taken illegally was shown. In *Turcott v. United States,* 21 F. 2d 829 (7th Cir., 1927), the facts are not stated and it is submitted that the court in using the word "participation" meant a party to the agreement or aiding or abetting since it is well settled that every conspirator need not perform an overt act. In *McDaniel v. United States,* 24 F. 2d 303 (5th Cir., 1928), the evidence was held sufficient, the case was reversed on instructions. In *Sugarman v. United States,* 35 F. 2d 663 (9th Cir., 1929), no knowledge and no possession of the liquor were shown. In *Ventimiglio v. United States,* 61 F. 2d 619 (6th Cir., 1932), the court held there was a failure to prove knowledge of the illegal purpose of the others shown to be in the conspiracy. The *Weiniger* and *Marino* cases are cited above.

In respect to Count IV, the concealment of narcotics in the home of appellants, the statutory presumption set

forth in the last paragraph of Section 174 of Title 21, U. S. C., comes into full play. It reads:

> "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury:"

Both appellants were in constructive possession of the narcotics. Knowledge of the circumstances of its being there is shown above.

In *Brown v. United States,* 222 F. 2d 293 at 297, this court said:

> "In Mullaney v. United States, 9 Cir., 1936, 82 F. 2d 638, 642, this court approved an instruction of the trial court that 'possession of a thing means having in one's control or under one's dominion.' It is not necessary that possession be immediate or exclusive. Mullaney v. United States, *supra;* Borgfeldt v. United States, 9 Cir., 1933, 67 F. 2d 967."

Appellants last argument in respect to the sufficiency of the evidence is to the effect that the circumstantial evidence fails "to exclude a reasonable deduction of innocence equal in weight with the inference of guilt."

This case is not wholly circumstantial. There was direct evidence of the joint ownership and joint occupancy of the house, of appellant Gabriel's delivery and sale of heroin, of the concealment of heroin in the kitchen of the home. But even assuming that it was wholly circumstantial, without reiterating the evidence, we submit that there was substantial evidence upon which the case should go to the jury and that the inferences which could be

reasonably and properly drawn from the evidence excludes "a reasonable deduction of innocence."

In any event, this court does not appear to follow the rule announced in the cases cited by appellants on this proposition. Under proper instructions it is the jury's function to determine whether the inferences they believe flow from the evidence overcomes the presumption of innocence.

This court has said:

> "It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence."
>
> *Stoppelli v. United States,* 183 F. 2d 391 at 393 and cases there cited (9th Cir., 1950). Cert. denied 340 U. S. 864, and 340 U. S. 898.

To the same effect, citing *Stoppelli, supra,* with approval see: *United States v. Pesano,* 193 F. 2d 355 at 360 (7th Cir., 1951); *Remmer v. United States,* 205 F. 2d 277 at page 288 (9th Cir., 1953); *Charles v. United States,* 215 F. 2d 831 at 834 (9th Cir., 1954); *United States v. White,* 228 F. 2d 832 at 833 (7th Cir., 1956); *Elwert v. United States,* 231 F. 2d 928 at 933 (9th Cir., 1956).

B. The Search and Seizure.

1. The Entry of the Premises.

Federal officers are under the duty to enforce the criminal laws and in connection therewith they may make an arrest without a warrant for felonies committed in their presence or they may make such arrests upon reasonable cause that the person sought to be arrested has committed a felony.

Agnello v. United States, 269 U. S. 20;
Kathriner v. United States (9 Cir.), 276 Fed. 808;
Vachina v. United States (9 Cir.), 283 Fed. 35;
Bachenberg v. United States (9 Cir.), 283 Fed. 37;
Miller v. United States (9 Cir.), 9 F. 2d 382.

In the absence of a specific statute dealing with authority to arrest, the law determining the validity of an arrest by a federal officer without a warrant is the law of the state where the arrest occurs.

United States v. Di Re, 332 U. S. 581, at 589.

We have found no such statute in respect to agents of the Bureau of Narcotics for February, 1956.

The Penal Code of the State of California, Section 836, provides in pertinent part:

"Arrest by Peace Officers.

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

* * * * * * * * * *

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested."

Section 844 of said Penal Code provides:

"To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

Narcotics Agents Jones and Gullon arrested defendants Hernandez and Gavaldon for the commission of a felony in their presence.

Upon their ascertaining that the package being transmitted from Gavaldon to Hernandez was an opium derivative [R. 150-151] and after hearing the conversation in Spanish to the effect that the appellant Gabriel T. Martinez was at the house (3040 Atwater) awaiting the return of Gavaldon with the money, and taking into consideration the information that had been given to them by Howe about the previous transactions involving the sale of heroin, such Narcotics Agents were justified and under the duty of making an immediate arrest of Gabriel T. Martinez as a principal to the transportation, concealment and sale of a narcotic which had occurred in the officers' presence.

In *People v. Maddox,* 294 P. 2d 6 (S. Ct. of Calif. in Bank, 1956), where an officer with probable cause to make an arrest knocked on the door of the defendant's home,

heard, "Wait a minute," and also heard "the sound of retreating footsteps," and thereupon kicked in the door and entered, the court held that the latter portions of Section 844 (above quoted) were inapplicable and "that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose," see page 9 of opinion.

To the same effect, see *People v. King,* 294 P. 2d 972 (Dist. Ct. of Appeal, Calif., 1956); *People v. Sayles,* 295 P. 2d 579 (Dist. Ct. of Appeal, Calif., 1956).

In a federal case decided before the *Di Re* case, *supra,* this court held that if an officer has reasonable cause to believe that the person to be arrested is inside a building or dwelling, he has authority, after identifying himself and demanding admittance, to break in, upon a refusal to admit him, to effect an arrest.

Mattus v. United States (9 Cir.), 11 F. 2d 503.

The officers' breaking and entering into the house at 3040 Atwater, Los Angeles, was under substantially identical circumstances to those of the *Mattus* case, *supra,* where the officers had identified themselves as Federal Narcotics Agents and demanded to be admitted and upon noncompliance had broken in. Such entry and subsequent arrest were upheld.

The evidence further shows that the officers' peril would have been increased or their arrest frustrated if they had taken the additional time to announce their purpose. Both officers heard the running of feet [R. 139, 180] and, as to Gullon, the door was being locked even as he demanded admittance [R. 179-180, 198].

2. The Search Incident to an Arrest.

The officers' original entry in the premises of 3040 Atwater having been lawful, notwithstanding that the person sought to be arrested was not there or had escaped, the officers were entitled to arrest any person on the premises that they had probable or reasonable cause to believe had committed a past felony or that they had reasonable or probable cause to believe was then committing a felony.

Mattus v. United States, supra;

Mullaney v. United States, 82 F. 2d 638;

Kwong How v. United States (9 Cir.), 71 F. 2d 71;

Carroll v. United States, 267 U. S. 132;

Brinegar v. United States, 338 U. S. 160;

Agnello v. United States, supra.

Agent Jones on entry recognized the defendant Campos as being the person who had on a prior occasion acted as lookout for the appellant Gabriel Martinez on an occasion when Gabriel Martinez had transported and delivered to the defendant Hernandez for Howe a quantity of heroin. Jones after identifying himself had attempted to place Campos under arrest in the house, which arrest was resisted until the officer used such force as was necessary to effect custody. Thereafter, the arrest of Campos was completed in the immediate vicinity of the dwelling at 3040 Atwater.

Pursuant and incident to a valid arrest a Federal Agent may make a search of the premises where the arrest is effected.

United States v. Rabinowitz, 339 U. S. 56;
Carroll v. United States, supra;
Brinegar v. United States, supra;
Agnello v. United States, supra.

And the fruits or evidence of the crimes may be seized incident to such arrest (Same cases as cited immediately above). The search may go beyond the immediate presence of the defendant and is not restricted to things open to sight.

Harris v. United States, 331 U. S. 145;
United States v. Rabinowitz, supra.

It is true that approximately thirty minutes elapsed between the entry and the beginning of the search, as asserted by appellants [R. 145-146, 148-149, 156, 181-183]. But this is not an unreasonable lapse of time, considering that one of the officers was chasing the man that had shot him [R. 144] and the other officer was securing help from local officers and also had the problem of watching over Campos, who was wounded and for whom an ambulance was called [R. 180-181].

And we submit that the officers' right to search the premises incident to the arrest of Campos is not affected because they thought "it was wise to ask the defendant . . . for permission to search" [R. 201].

And we further submit that the officers' right so to search was not affected by their forbearance until permission had been granted [R. 158]; this could have been

accidental or the result of intelligent desire to have more than one legal basis for the search. It appears to have been the latter [R. 201].

We quote from the *Brinegar* case, *supra,* in respect to probable cause and the duties of law enforcement officers under such circumstances as occurred in this case (p. 176):

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Page 179:

> "Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of an agent. Prompt investigation may then not only discover but, what is still more important, may interrupt the crime and prevent some or all of its damaging consequences."

A number of cases are cited by appellants as to the extent of a search (see p. 26 of brief). *United States v. Charles,* 8 F. 2d 302, set up the test as permitting the

search of a building in which a person is arrested to the extent of his control *and his activities* are likely to extend.

In this regard, we would again like to call to the court's attention the statement of Theresa Martinez, made during the course of the search, that she had seen Velli, Gavaldon and Campos fooling with a powdery substance on the kitchen table [R. 149]. After this statement the search of the kitchen would seem most reasonable. It should also be remembered that boxes of gelatin capsules were open to view in the home [R. 196].

In another case cited by appellants, *Shew v. United States,* 155 F. 2d 628, a search of a smoke house some twenty feet from the point of arrest was permitted, the court saying "the search can [cover] all parts of the premises used for the unlawful purpose," see page 630. Cert. denied 328 U. S. 870.

3. The Consent of Theresa Martinez.

Notwithstanding the officers' right to make a search of the premises incident to arrest they secured in addition thereto the consent of a co-occupant of such premises. Consent of a joint occupant or a joint owner is sufficient for all.

Stein v. United States (9 Cir.), 166 F. 2d 851, cert. den. 344 U. S. 844;

Raine v. United States, 299 Fed. 407, cert. den. 266 U. S. 611;

United States v. Sferas (7 Cir., 1954), 210 F. 2d 69 at 74.

The above cases were decided subsequent to *Amos v. United States,* 255 U. S. 313, cited by appellants, and are distinguishable because the *Amos* case did not decide a

wife could not give a valid consent to a search. The court expressly left that question open, see page 317 of the opinion. In *Amos* there was no consent, nor did the Government argue there was. The officers there advised the woman they were going to search, and she gave way without saying anything.

We concede in this discussion that a consent to search must be intelligently and voluntarily given and that there must not be any element of fraud in securing the consent nor any use of force.

Appellants cite a great many cases setting forth the proposition that a consent given in the face of armed intrusion is suspect and the Government has the burden of proving a real consent. We have no quarrel with this position—it just doesn't apply to the peculiar circumstances of this case.

The entry here was legal and was to effect an arrest. Because of the necessity of other activity some thirty minutes expired before consent to search was requested. There isn't any evidence that the officers were still displaying their weapons at that point. There is no evidence that they used any force or any subterfuge to get a consent to the search. In fact the evidence is quite to the contrary. Gullon asked for permission to search room by room and in both English and Spanish [R. 183]. Other officers heard the consent asked for and given [R. 147, 208]. Theresa was not reticent about talking. She made statements about her husband and Campos and Gavaldon which were quite revealing in respect to their criminal activities. She is not shown to be the proverbial timid housewife type, but the proprietor of a small business. Presumptively she knew what her rights were.

We suggest that her denial of consent was an afterthought. In this regard it is to be noted that her denial is in the most general terms in an affidavit as follows:

> "That on February 27, 1956, Federal narcotics agents * * * without a search warrant being served or displayed and without her permission, forcibly entered the home of defendants * * * and removed therefrom certain substance * * *" [R. 11].
>
> "* * * that the house and car was entered and searched without a search warrant and without her sanction and waiver of constitutional rights. * * *" [R. 12].

These are merely conclusions. A similar situation was considered in *United States v. Mitchell,* 322 U. S. 65 at pages 69 and 70 with footnote No. 2. Theresa Martinez did not take the stand at the hearing on the motion to suppress nor at the trial. Nowhere in this record does it appear from her that she was overreached, coerced or intimidated. The evidence is to the contrary. It is shown that she was cooperative [R. 183] and her frequent attempts to put the blame on the other defendants substantiates this evaluation.

Appellants place great stress upon *Higgins v. United States,* 209 F. 2d 819 (D. C. Cir., 1954) and its holding that no sane man would consent to a search if discovery of contraband were certain to follow. But the court there qualifies its remarks: ". . . at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present." (See p. 820.)

We submit that the evidence here shows such extraordinary circumstances.

Apart from the obvious explanation that Theresa Martinez was attempting to put the blame on the others and bluff it out for herself, there is an explanation shown by the evidence which makes the reasoning of *Higgins* case wholly inapplicable to the consent given in this instance.

On February 27, 1956, just before Hernandez's telephone call, Howe told him he wanted one-half ounce of heroin and Hernandez said he would get it for him [R. 90]. The chemist pointed out that an avoirdupois ounce contained 437½ grains [R. 222]; therefore a half ounce would be 218¾ grains. The chemist also testified that Exhibit 3, recovered in the street, and Exhibit 4 found in the kitchen, came from a common source by reason of exactly identical chemical properties and appearance [R. 221]. They were also packaged in the same way, being gelatin capsules wrapped in balloons.

The chemist further testified *to the effect* that their combined weight before analysis was 215 to 224 grains [R. 222-223], very nearly one-half an ounce which would be 218¾ grains.

We suggest that after Hernandez's call came to the house advising that a purchaser for one-half ounce was waiting, that this quantity was made up for delivery. Then either part of the total to be delivered was left behind accidentally, or Gavaldon, the deliveryman, decided to "short change" the buyer.

Theresa Martinez could well have believed that the half ounce was out in the street being delivered and none remained behind in her kitchen.

Lastly, implicit in the trial court's order denying the appellants' motion to suppress, made both before and during trial, are findings that the search of these premises was legal and not in violation of the appellants' constitutional rights. Such findings should be sustained unless clearly shown to be erroneous as a matter of law.

> *United States v. Gypsum Co.,* 333 U. S. 364 at 394-395 (1948).

See also:

> *United States v. Mitchell,* 322 U. S. 65 at 69-70 (1944).

C. Proof and Pleading of Overt Act.

Proof of a single overt act is sufficient to sustain a conviction under a conspiracy count.

> *Marino v. United States,* 91 F. 2d 691 at 694 (9th Cir., 1937).

The first overt act charged in the indictment is as follows:

> "(1) On or about February 27, 1956, defendant Joel Hernandez had a conversation with Jack C. Howe at 151 North Boylston Street, Los Angeles, California, where he received from Jack C. Howe $140.00;"

We have already discussed the evidence as to the conspiracy and Hernandez's part therein. It is clear from the evidence that Howe met Hernandez at 151 North

Boylston Street [R. 89-90, 129-130]. It is also clear that they had a conversation which must have commenced at the time of their meeting [R. 90]. The $140.00 was shown to Hernandez but actually delivered a few minutes later at Atwater and Fletcher Streets in Los Angeles [R. 90]. This money was obviously for the purchase of narcotics and was later found partly on Gavaldon as previously stated.

The only variance between pleading and proof is as to the place of delivery of the money.

In a case almost identical hereto, as to the variance, where a sale of illicit liquor was pleaded to have occurred "at the northeast corner of Clay and Kearney Streets" in San Francisco, but the proof was that the delivery of the liquor and payment of the money was elsewhere, this court held there was no material or fatal variance.

McDonough v. United States, 299 Fed. 30 at 39-40 (9th Cir., 1924).

In any event, appellants have failed to show how they were prejudiced by what variance did exist here.

See:

United States v. Ragen, 314 U. S. 513 at 526;

Berger v. United States, 295 U. S. 78 at 81-82;

Smith v. United States, 50 F. 2d 46 at 47 (8th Cir., 1931);

Federal Rules of Criminal Procedure, Rule 52(a).

Conclusion.

We submit that the constitutional rights of the appellants were not violated by the search and seizure, because it was incident to a valid arrest and was consented to by an owner of the premises; that the variance between pleading and proof was immaterial and not prejudicial to the appellants; that there is sufficient and substantial evidence to warrant the judgments of conviction entered herein.

Respectfully submitted,

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